FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Petition not printed

No, 655

WILLIAM JEROME PHYLE,

Petitioner,

vs.

CLINTON T. DUFFY, WARDEN OF THE STATE PRISON AT SAN QUENTIN, STATE OF CALIFORNIA,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONER'S OPENING BRIEF

MORRIS LAVINE,
215 West Seventh Street,
Los Angeles, California,
Attorney for Petitioner.

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OPENING BRIEF

Opinion Below

30 Adv. Cal. Reports, p. 843; 186 Pac. (2d) 134.

The decision of the Supreme Court of the State of California discharging the writ of habeas corpus was rendered November 10, 1947. Petition for rehearing was filed in said Court on December 8, 1947. Rehearing was denied December 10, 1947, Justices Jesse Carter and B. Ray Schauer voting for a rehearing. Petition for certiorari was filed in the Supreme Court of the United States on or about March 1, 1948, and certiorari was granted on March 8, 1948.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, section 344, U. S. C. and the Fourteenth Amendment to the Constitution of the United States.

Title 28, section 344, U. S. C., provides as follows:

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

Statutes Involved

"No judge, court or officer, other than the governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken."

(Section 3700, Penal Code of the State of California.)

"If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose

duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of twelve persons to hear such inquiry."

(Section 3701, Penal Code of the State of California.)

"The district attorney must attend the hearing, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court."

(Section 3702, Penal Code of the State of California.)

"The verdict of the jury must be entered upon the minutes, and thereupon the court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof, and when it is found that the defendant is insane, the order must direct that he be taken to a State hospital for the insane, and there kept in safe confinement until his reason is restored."

(Section 3703, Penal Code [redacted] the State of California.)

"If it is found that the defendant is sane, the warden must proceed to execute the judgment as specified in the warrant; if it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order mentioned in the last section to the Governor, and deliver the defendant, together with a certified copy of such order, to the medical superintendent of the hospital named in such order. When the defendant recovers his reason, the superintendent of such hospital mu certify that fact to the Governor, who must thereupon issue to the warden his warrant

appointing a day for the execution of the judgment, and the warden shall thereupon return the defendant to the State prison pending the execution of the judgment."

(Section 3704, Penal Code of the State of California.)

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person, within its jurisdiction the equal protection of the laws."

(Section 1, Fourteenth Amendment to the Constitution of the United States.)

Statement of the Case

William Jerome Phyle was adjudged insane in a trial by jury in Marin County, California. He was at the time of this trial a prisoner at the State Prison at San Quentin, California, under sentence of death. The warden of the State prison had declared a doubt as to his sanity and had requested a jury trial, which was granted, and it was in this trial that Phyle was adjudicated insane. He was thereafter removed to the State Hospital for the Insane at Mendocino, California. Under California laws an insane person cannot be executed. Eighteen days after Phyle was removed to the State Hospital, the superintendent of this hospital sent him back with a declaration of restoration to sanity. This return to the State Prison and this declaration by the lone superintendent of the hospital meant in effect a new death sentence for Phyle, the execution date being thereafter set for March 12, 1948.

As there had been no trial or court proceeding, or judi-

cial inquiry of any kind or character to determine whether Phyle's sanity was actually restored, Al Matthews, an attorney for the petitioner Phyle, filed a petition for a writ of habeas corpus in his behalf in the Supreme Court of the State of California to test by court action, with a court hearing and with counsel, and a full review, whether or not Phyle's sanity had been restored, or whether he was still insane and whether California's statutes and procedure, permitting a single administrative officer to overrule the determination of a judicial body and a jury, and decree the death of a man whom a jury had just eighteen days before that time pronounced insane, and to determine whether section 3704 of the Penal Code of the State of California, purporting to give that power to a single administrative officer, without the possibility of judicial review, was lacking in due process of law as to violate the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of California (two justices dissenting) held that Phyle was not entitled to a court proceeding or procedure and to a writ of habeas corpus, and was not entitled to a court hearing on the question of the restoration of his sanity and on the determination of whether he was still insane, and whether an insane person could be executed, and that the procedure set out by section 3704 of the Penal Code of California, which denies a court hearing and counsel to a man, whom the habeas corpus petition alleges is still insane, is not proscribed by the due process clause of the Fourteenth Amendment to the Constitution of the United States and is not cruel and unusual punishment as forbidden by the Eighth Amendment to the Constitution of the United States, inherent in and a part of the Fourteenth Amendment to the Constitution of the United States.

The prisoner Phyle had no court procedure, no counsel

or friend to represent him, no processes of court, and no doctors or witnesses to testify in his behalf or any friend or representative to aid him on whether his sanity was "restored eighteen days after a jury and a court had adjudicated him insane."

It is respectfully contended that such procedure and proceedings are so utterly lacking in due process of law as is forbidden by the Fourteenth Amendment to the Constitution of the United States, and that to execute an insane man would be cruel and unusual punishment forbidden by the Eighth Amendment to the Constitution of the United States inherent in the Fourteenth Amendment.

Section 3704 of the California Penal Code provides as follows:

> ". . . if it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order mentioned in the last section to the Governor, and deliver the defendant, together with a certified copy of such order, to the medical superintendent of the hospital named in such order. When the defendant recovers his reason, the superintendent must certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment, and the warden shall thereupon return the defendant to the State prison pending the execution of the judgment."

Pursuant to the individual superintendent's certificate petitioner Phyle was taken back to San Quentin for the purpose of being executed. Attorney Al Matthews, who was representing petitioner, then filed a petition for a writ of habeas corpus challenging the constitutionality and validity of the State Statute above quoted, by which a jury in a full and fair trial adjudicated the defendant insane and then the superintendent of the hospital eighteen days after-

wards, without trial, sends the defendant back to be executed.

The petition for the writ of habeas corpus alleged that Phyle is insane and this allegation in the petition was never controverted.

Therefore, the issue involves whether an insane person may be executed without trial or hearing merely on the certificate of a superintendent of a hospital and with no legal redress or proceeding entitling him to the benefit of counsel or to a full hearing in a court before he is to be executed, or to a writ of habeas corpus.

The Supreme Court of California discharged the writ of habeas corpus and remanded petitioner to the custody of the warden for execution, holding that there was no power in the court to investigate or determine whether petitioner is now sane.

The California court holds that even though the defendant was found to be insane, it was not necessary for the court to determine that he was sane or have any legal proceedings to be afforded to a person found insane in order to safeguard his fundamental and constitutional rights. Two justices of the state Supreme Court dissented (30 A. C. 856-865).

The question, therefore, is whether section 3704 of the Penal Code of the State of California inherently and as construed and applied in this case is in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and involves the construction not only of a statute, but of procedural due process involving an insane person and his right

(1) to counsel;

(2) to a court hearing and to be fully protected to determine whether he has recovered his reason, or whether an insane person is to be put to death without

notice, without an opportunity to be heard and without counsel.

The issues were raised before the Supreme Court of California in the petition for writ of habeas corpus and were determined by that Court adversely to the rights of petitioner guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In the petition for rehearing before the Supreme Court of California, the petitioner's rights were again reasserted as being violative under the Fourteenth Amendment to the Constitution of the United States.

Justice Schauer in his dissenting opinion, (30 A. C. 843, at page 859), states:

"From what has been above related it appears that the basic issue here is, is the asserted determination of the medical superintendent that the prisoner is now sane conclusive on the court and on the prisoner in a habeas corpus proceeding wherein it is alleged that the prisoner is in fact insane? In other words, does certification of sanity by a state hospital superintendent preclude the prisoner from alleging and proving and the court from determining that, contrary to the certification, the prisoner is in truth insane? If the answer to these questions is yes, as the majority hold, then the right of habeas corpus is effectively abrogated as to persons in the status of the prisoner before us.

"The holding of the majority opinion that the medical superintendent has exclusive and transcendent powers to determine questions of sanity of prisoners is squarely contrary to earlier holdings of this court. In *Gardner* v. *Jones* (1899), 126 Cal. 614 (59 P. 126), we find a case which in material legal principles is identical to that now before us. Dr. A. M. Gardner was then (1899) superintendent of the Napa State Hospital. He applied to this court for a writ to prohibit defendant (judge of the Superior court of Contra Costa County, and the superior court of Napa County)

from entertaining jurisdiction in a certain habeas corpus case' whereby the Napa County Superior Court was assuming to determine the question of the restoration to sanity of one Buchanan, who had been committed to the state hospital as insane. This Court said (pages 615-616 of 126 Cal.), 'The question is an important one, inasmuch as it involves the right of an inmate of a state hospital, who happens at the time to be resting under a criminal charge and is committed pending trial of his crime, to have his alleged insanity made the subject of judicial inquiry by the writ of *habeas corpus*. It is claimed (exactly as here) that '*the medical superintendent is the only person or tribunal vested by law with authority to determine whether or not an insane patient of this class has recovered.*'" At page 865 Judge Schauer states:

"The history of habeas corpus, the great care with which the rights of all persons to invoke that remedy have been guarded by provisions of our national and state constitutions and the jealous solicitude with which the courts have heretofore protected those rights, all combine to forbid the holding which the prosecuting officers of this state now espouse and which the majority make.

"The State, if it requests such relief, should be given opportunity to challenge the now admitted averment that the prisoner 'still is' insane; that issue should then be tried out before a referee; and our order should depend on *our* determination of the fact, not on subservience to an asserted 'conclusive' determination of an administrative agent. Thus may the right of habeas corpus be preserved, the court maintain its jurisdiction, and justice still run its full course."

Specification of Errors

The petitioner specifies all of the errors assigned and all of the questions presented, which are as follows:

(1) Whether a State statute inherently and as construed and applied in this case is unconstitutional and

in violation of the Fourteenth Amendment of the Constitution of the United States, where it provides no notice or an opportunity to be heard, with counsel of one's choice on the question of restoration of sanity, the result of which means the execution of the person so involved.

(2) Whether such a statute offends procedural due process of law and is offensive to the fundamental principles of justice which inhere in our institutions.

(3) Whether a person declared insane by a finding of a court and jury can be declared sane by a single superintendent of a hospital without affording a subsequent judicial review of such finding.

(4) Whether the execution of an insane person is so abhorrent to our principles of justice to offend due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(5) Whether the execution of a person on the single statement of a superintendent of hospitals, without an opportunity for judicial review, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

(6) Whether the ordering of the execution of an insane person, without notice, without opportunity to be heard, without judicial review, and without counsel of his choice or of his friends or relatives with an opportunity for judicial review, is so lacking in fundamental fairness as to violate both due process of law and to constitute cruel and unusual punishment inherent in the Fourteenth Amendment by reason of its presence in the Eighth Amendment to the Constitution of the United States.

Summary of the Argument

I.

SECTION 3704 OF THE PENAL CODE OF THE STATE OF CALIFORNIA INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHERE IT PROVIDES NO NOTICE OR AN OPPORTUNITY TO BE HEARD, WITH COUNSEL OF ONE'S CHOICE, ON THE RESTORATION OF ONE'S SANITY, THE RESULT OF WHICH MEANS THE EXECUTION OF THE PETITIONER HEREIN.

II

PROCEDURAL DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IS VIOLATIVE BY A PROCEDURE AND PROCEEDING UNDER A STATUTE WHICH PERMITS A PERSON HERETOFORE FOUND INSANE BY A JURY TO BE DECLARED SANE BY A SINGLE SUPERINTENDENT OF A HOSPITAL WITHOUT AFFORDING SUBSEQUENT JUDICIAL REVIEW OF SUCH FINDING.

III

THE EXECUTION OF AN INSANE PERSON IS SO ABHORRENT TO PRINCIPLES OF JUSTICE AS TO OFFEND DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND NO STATE SHOULD CARRY OUT SUCH AN EXECUTION WITHOUT A LEGAL DETERMINATION THAT THE PERSON ABOUT TO BE EXECUTED IS NOT INSANE.

IV

THE EXECUTION OF A PERSON ON THE SINGLE STATEMENT OF A SUPERINTENDENT OF HOSPITAL AFTER SUCH EXECUTION HAS BEEN HALTED BY THE VERDICT OF A JURY THAT SUCH PERSON IS INSANE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT AND FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

V

THE ORDERING OF THE EXECUTION OF AN INSANE PERSON, WITHOUT NOTICE, WITHOUT OPPORTUNITY TO BE HEARD, WITHOUT JUDICIAL REVIEW, AND WITHOUT COUNSEL OF HIS CHOICE OR OF HIS FRIENDS OR REPRESENTATIVES TO HAVE AN OPPORTUNITY FOR JUDICIAL REVIEW, IS SO LACKING IN FUNDAMENTAL FAIRNESS AS TO VIOLATE BOTH DUE PROCESS OF LAW AND TO CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT INHERENT IN THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY REASON OF ITS PRESENCE IN THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

I

Section 3704 of the Penal Code of the State of California inherently and as construed and applied in this case is in violation of the Fourteenth Amendment to the Constitution of the United States where it provides no notice or an opportunity to be heard, with counsel of one's choice, on the restoration of one's sanity, the result of which means the execution of the petitioner herein.

II

Procedural due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States is violative by a procedure and proceeding under a statute which permits a person heretofore found insane by a jury to be declared sane by a single superintendent of a hospital without affording subsequent judicial review of such finding.

The petitioner was adjudicated to be insane after trial by jury in Marin County, California. Such adjudication by a court and jury halted his execution, according to California statutes relating thereto, but a single doctor, the superintendant of a State Hospital, certified eighteen days

thereafter that petitioner was sane. This certification was had without any judicial review. Petitioner Phyle's attorney then petitioned the Supreme Court of California for a writ of *habeas corpus*. The petition alleged that Phyle was still insane. The California Court said that Phyle was not entitled to a judicial review on the restoration of his sanity, and that even though the petition for a writ of *habeas corpus* alleged that he was insane, and this was not controverted except by the superintendent of the State Hospital, he could not have a judicial review or determination of those facts. These proceedings were taken without any counsel being present, without any opportunity to be heard with witnesses, or without any manner or means of nullifying the action of the single superintendent of the hospital. The procedure thus given its approval by California represents more the procedure of dictator countries, like Germany during the war, where a single doctor could doom any person.

This Court has always held that a State must afford procedural due process of law through its Courts, must afford notice and an opportunity to be heard, and this strikes at the fundamental fairness always preserved by this Court.

In the famous *Mooney* case, (*Mooney* v. *Holohan*), 294 U. S. 103, 79 L. Ed. 791, this Court held that the great Writ of Habeas Corpus was available even twenty years after a conviction had been affirmed and time served in prison, to test whether the trial was based upon perjured testimony known to the State, and that habeas corpus was available to test the fundamental fairness of the proceeding.

This Court again held that habeas corpus was available in the case of a prisoner who had pleaded guilty under a promise which was not kept. *Smith* v. *O'Grady*, 312 U. S. 329, 85 L. Ed. 859.

Habeas Corpus was held to be available to test the fundamental fairness of a proceeding before an Immigration

Commissioner. There, as here, the determination was made by an administrative officer, but this Court said that a court review must be had where the test involved the correctness of the proceeding.

Ng Fung Ho v. *White*, 259 U. S. 276, 66 L. Ed. 938.
See, also, *House* v. *Mayo*, 324 U. S. 42, 89 L. Ed. 739;
Ex parte Hawk, 321 U. S. 114, 88 L. Ed. 572;
Avery v. *Alabama*, 308 U. S. 443, 84 L. Ed. 377;
White v. *Ragan*, 324 U. S. 760, 89 L. Ed. 1348.

The right to counsel, the right to be fully heard through counsel of one's choice, and with all the protection and safeguards of a court or proceedings which give the defendant the right to be adjudicated fully and fairly, are essential to due process of law.

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158.

If a person who is well educated, who might even be a lawyer, has the right to have counsel of his choice and needs it to protect himself, how much more so a person who has been adjudicated insane and who may not know or understand the nature and consequences of his act?

In *Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, this Court held that even a well educated person might make many missteps if he is not represented by counsel, and in many cases this Court has said that counsel, to protect one accused of crime, is one of the fundamental safeguards in our system of due process. The State of California deemed that this was not the right of petitioner.

In an earlier case in the State of California, *In re Lambert*, 134 Cal. 626, it was held that a law which failed to require notice to a person and an opportunity to be heard on whether he was to be declared insane on a certificate of two medical doctors, is void as depriving a person of his liberty without due process of law, in not giving such per-

son an opportunity to be heard. Equally true is the situation where a person has been found insane and there is to be a determination of his restoration to sanity, which might spell his death.

In *State* v. *Billings,* 43 Amer. State Reports 539, it is said:

> "Persons, though insane, are still human beings, and laws regarding them are 'the vast difference between a civilized people and a savage nation.'"

As said in *In Re Lambert, supra,* regarding a law declaring a person insane:

> "The law must require notice to him, and give him the right to a hearing and opportunity to be heard. The constitutional validity of the law is to be tested, not by what has been done under it, but by what may by its authority be done."

An order for the return of petitioner Phyle to the State prison at San Quentin, California, for execution, after a jury has found him insane and not subject to execution, is essentially a judgment by which the defendant is deprived of his life. It is a cardinal principle in English jurisprudence that, before any judgment can be pronounced against a person, there must be a trial of the issue upon which the judgment is given. A proceeding of this character, where there is no hearing, where a superintendent of an institution arbitrarily returns a man to prison, without having a hearing at which an attorney is present, or some friend is present, or he is in some manner represented, is in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The proceedings now approved by the State Supreme Court of California resemble more the actions of dictatorships as they existed in Germany, Italy and Russia during

the war. There, that is, in Germany, a single doctor, by a single decree, declared that a man was insane and sent him to his death. In the present proceedings, a doctor by a single decree declared the man sane and sentenced him to his death. Both are products of a single dictator—the thing we fought against in a great war.

The California State Supreme Court relies on a Georgia statute and a case decided by the Supreme Court of the United States, to-wit: *Nobles* v. *Georgia*, 168 U. S. 398, at page 404, in support of the position that the Court takes in the majority opinion. A careful analysis of that case, however, supports not the Court's contention, but our contention. In that case, a Georgia statute provided for the determination of insanity on the suggestion of a person after conviction of crime. The statute also provides further:

> "and at any time thereafter, when it shall appear *to the said presiding Judge*, either by inquisition or otherwise, that the said convict is of sound mind, the said Judge shall issue a new warrant, directing the Sheriff to do execution of said sentence."

Thus it is apparent that before the *judicial* determination can be set aside that a *presiding Judge must by inquisition or otherwise* determine *judicially* that the said proceedings be set aside.

This is quite different from the proceedings provided by the California statute and the California decision that a doctor and administrative officer, without taking any testimony by *inquisition or otherwise*, can set aside the *solemn judicial determination of a court*, which tried the issue and a judicial determination by a jury that the defendant is insane.

Furthermore, the decision of the Supreme Court of the United States referred to, comments on the fact that there

was adequate administrative and quasi-judicial process for the purpose of investigating the question of insanity.

That case dealt with a statute providing for the determination of insanity, not for the determination of the restoration of sanity. Furthermore, the statute was like section 3700 of the Penal Code of California, which provides for the determination of insanity. It is apparent that adequate safeguards are provided in this State for the determination of insanity. The Court has now stretched the statutes to provide for inadequate determination of the restoration of sanity. No case is cited by the majority of the Supreme Court, and we believe none can be found, that holds that the restoration of sanity may be determined by an administrative officer without notice, without hearing and without representation of counsel. None of the cases referred to by the Court in 49 A. L. R. 804, wherein are summed up various cases, referring to the determination of insanity, hold that a person may be found insane without notice, or hearing or without adequate administrative or judicial processes of some kind or other for the purposes of an adequate hearing on the question of insanity.

In California, such proceedings have been held to be unconstitutional where they fail to provide for adequate judicial determination of the issue of insanity. *In Re Lambert*, 134 Cal. 626, 66 Pac. 851.

Petitioner herein was given a hearing in accordance with section 3700 *et seq.* of the Penal Code on the question of his insanity. He was tried by a jury, and a judicial judgment was entered declaring him to be legally insane. In that proceeding he was afforded due process. He was permitted the processes of the Court; he was given notice and an opportunity to be heard. But when the proceedings were had before the doctor of the State Hospital, no such hearing was had. He was not represented by counsel; he did not have the opportunity to produce any evidence, nor was he

in a mental condition to produce any evidence because he was then insane, and there has been no denial of the petition for the writ that his insanity still continues. Yet, a proceeding is permitted, according to the Court's decision, wherein Phyle, although insane and not competent to handle his own defense, and not represented by counsel, was declared sane by the doctor, and on this declaration alone is being sent to his doom.

A defendant in a criminal proceeding is entitled to be represented by counsel at every stage of the proceedings, and is entitled to notice and a hearing, the first essentials of due process of law, or he is denied due process of law. *Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158.

The right to counsel is guaranteed to a person charged with crime at every stage of the proceedings. See the following cases:

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158;
White v. *Ragan*, 324 U. S. 760, 89 L. Ed. 1348;
Rice v. *Olson*, 324 U. S. 786, 89 L. Ed. 1367;
House v. *Mayo*, 324 U. S. 42, 89 L. Ed. 739.

The rights involved here are fundamental rights protected by the Fourteenth Amendment to the Constitution of the United States. The rights to habeas corpus proceedings to protect those fundamental rights are guaranteed by the Constitution of the United States.

Ng Fung Ho v. *White*, 259 U. S. 276, 66 L. Ed. 938;
Mooney v. *Holohan*, 294 U. S. 103, 79 L. Ed. 791;
Smith v. *O'Grady*, 312 U. S. 329, 85 L. Ed. 859;
Woods v. *Nierstheimer*, 328 U. S. 211, 90 L. Ed. 1177;
Ex Parte Hawk, 321 U. S. 114, 88 L. Ed. 572.

In *Cox et al.* v. *U. S.*, 16 L. W. 4029, at 4033, it is said:

"Petitioner claims that his status as a minister is a 'jurisdictional fact' which may be determined *de novo*

(reexamination of the record of the former hearing with right to adduce additional evidence) in a criminal trial, and relies on *Ng Fung Ho* v. *White*, 259 U. S. 276, where we held that an alleged alien was entitled to a judicial trial on the issue of alienage in *habeas corpus* proceedings. But that case is different from this. The alien, there, claimed American citizenship. As such, this Court said, he had a right to a judicial hearing of his claim as a matter of due process. This he could not get before the Commissioner of Immigration. Therefore, since the deportation of a citizen may involve 'loss of all that makes life worth living,' this Court decided that the 'jurisdiction' of the Commissioner to try the alleged alien could be tested by *habeas corpus*. P. 284. That gave the alleged alien a judicial hearing. In these cases judicial review of administrative action is allowed in the criminal trial. This assures judicial consideration of a registrant's rights. Petitioners' objection on this point is in essence that the review is limited to evidence that appeared in the administrative proceeding. It seems to us that it is quite in accord with justice to limit the evidence as to status in the criminal trial on review of administrative action to that upon which the board acted. As we have said elsewhere the board records were made by petitioners. It was open to them there to furnish full information as to their activities. It is that record upon which the board acted and upon which the registrants' violation of orders must be predicated."

The denial to an accused of the right to habeas corpus denies him a right guaranteed by the Federal Constitution. The decision of the Supreme Court of California overrules decisions that hold that an administrative agency may not overrule a judicial decision of a court, and overrules the previous holding of the State Supreme Court in *Laisne* v. *State Board of Optometry* and of this Court. See the following cases:

Laisne v. *State Board of Optometry*, 19 Cal. (2d) 831, 133 Pac. (2d) 451;

Rummy v. *State Board of Funeral Directors*, 13 Cal. (2d) 85, 87 Pac. (2d) 848);
McDonough v. *Goodcell*, 13 Cal. (2d) 752;
St. Joseph's Stockyard Co. v. *U. S.*, 298 U. S. 38, 80 L. Ed. 1033;
Ohio Water Co. v. *Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908;
Crowell v. *Benson*, 285 U. S. 22, 76 L. Ed. 598.

In the case of *Laisne* v. *State Board, etc.*, not only the majority opinion but the minority opinion holds that there must be substantial evidence before the administrative agency. No evidence was taken before the doctor. Therefore, both according to the majority opinion and according to the minority opinion, since there was no evidence taken, the determination of the doctor, administrative agency, is of no force or effect.

Judicial questions must be determined by a court, as in the Georgia statute referred to in *Nobles* v. *Georgia*, 168 U. S. 398, 404, not by a doctor at a hospital. The value of the opinion of the doctor may determine in this proceeding just the same as it should be determined in any other habeas corpus proceeding by the finder of the fact, the judge, not the doctor. Here, the power is vested solely in the doctor, and not a court, and a doctor is thus empowered to nullify the solemn judgment of a court and the finding of 12 jurors on an issue of fact. The statute does not give the doctor that power, but the Supreme Court of California has given it to him in its opinion. The statute says:

"When he becomes sane"

and further provides:

"When the defendant recovers his reason the Superintendent must certify that fact."

This contemplates a judicial determination of the fact of recovery of reason. A doctor may testify to that fact in a judicial proceeding, the habeas corpus proceeding, but until the court itself has determined that fact from all the evidence before it, then . . . judicial determination has been nullified by a single person whose views may or may not be ultimately accepted by a court as the true finding of fact. Such a procedure or proceeding, we respectfully submit, violates due process of law.

III

The Supreme Court of California erred in its opinion that the statute, as construed by that Court, is not in violation of due process guaranteed by the Fourteenth Amendment to the Constitution of the United States and in holding that the statute is not special, partial and arbitrary.

We can think of no more arbitrary statute than section 3704 of the California Penal Code, which permits a doctor, without evidence, and arbitrarily, to declare a man sane—without trial, without hearing.

Procedural due process is not concerned with the result, but only the manner of its enforcement.

Snyder v. *Mass.*, 291 U. S. 97, 78 L. Ed. 674;
Hysler v. *Florida*, 315 U. S. 411, 86 L. Ed. 932.

Certainly the procedure followed by California proposing to execute an insane man without any judicial process being afforded to him is contrary to the fundamental fairness essential to the very concept of justice in America.

Smith v. *O'Grady*, 312 U. S. 329, 85 L. Ed. 859;
Mooney v. *Holohan*, 294 U. S. 103, 79 L. Ed. 791;
Ng Fung Ho v. *White*, 259 U. S. 276, 66 L. Ed. 938;
Cox et al. v. *U. S.*, 16 L. W. 4029, 4033.

Where proceedings have been held which fail to provide for adequate judicial determination of the issue of whether one is insane, and where such determination is based solely upon the acts of a doctor, with no hearing, such procedure has been held to violate due process of law. *In Re Lambert*, 134 Cal. 626; 66 Pac. 851. The same should be true on the question of restoration of sanity.

Petitioner William Jerome Phyle was given a hearing in accordance with Section 3700 *et seq.* of the Penal Code on the question of his insanity. He was tried by a jury, and a judicial judgment was entered declaring him to be legally insane. In that proceeding he was afforded due process. He was permitted the processes of the Court; he was given notice and an opportunity to be heard. But when the proceedings were had before the doctor of the State Hospital, no such hearing was had. He was not represented by counsel; he did not have the opportunity to produce any evidence, nor was he in a mental condition to produce any evidence because he was then insane, and there has been no denial of the petition for the writ that his sanity still continues. Yet, a proceeding is being permitted, according to the Court's decision, wherein Phyle, although insane and not competent to handle his own defense, and not represented by counsel, was declared sane by the doctor and on this declaration alone, is being sent to his doom.

An insane defendant is entitled to be represented by counsel even more than a sane person. Society must protect him since he cannot protect himself. He or his counsel is entitled to notice and a hearing, or there is denial of due process of law.

Powell v. *Alabama*, 287 U. S. 451, 77 L. Ed. 158.

In the case of *In Re Lambert*, 134 Cal. 626 (66 Pac. 851), the Court said:

> ". . . the statute which enabled a person to be declared insane on the certificate of two medical exam-

iners, is void as depriving a person of his liberty without due process of law in not giving the alleged insane person notice and opportunity to be heard."

If such a statute is in violation of due process of law in not giving the alleged insane person notice and an opportunity to be heard on the question of his insanity, it is equally void as depriving a person of his liberty in not giving him an opportunity to be heard on the question of his restoration to sanity. The Court in the *Lambert* case said:

> "The law must require notice to him, and give him the right to a hearing and opportunity to be heard. The constitutional validity of the law is to be tested, not by what has been done under it, but by what may by its authority be done."

An order for the return of the defendant, Phyle, to the State Prison for execution is essentially a judgment by which the defendant is to be deprived of his rights, and it is a cardinal principle in English jurisprudence that before any judgment can be pronounced against a person, there must have been a trial of the issue from which the judgment is given. A proceeding where there is no hearing at which the attorney is present or represented by any person, or an attorney of his choice, is in violation of due process of law. See *In Re Lambert*, 134 Cal. 626.

The right to counsel is fundamental. See the following cases:

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158;
White v. *Ragan*, 324 U. S. 760;
Rice v. *Olson*, 324 U. S. 786;
House v. *Mayo*, 324 U. S. 42.

The rights involved here are fundamental rights protected by the Fourteenth Amendment to the Constitution of the United States. The right to habeas corpus proceed-

ings to protect those fundamental rights is guaranteed by the Constitution of the United States.

Mooney v. *Holohan*, 294 U. S. 103;
Smith v. *O'Grady*, 312 U. S. 329;
Woods v. *Nierstheimer*, 328 U. S. 211;
Ex Parte Hawk, 321 U. S. 114.

California, as a part of the Union, is bound by the Fourteenth Amendment. Its own due process grants the right to habeas corpus. Cal. Const. Art. I, Section 5.

Judicial questions must be determined by a Court after a full hearing, not by a doctor of a hospital. We can think of nothing more resembling the powers of dictators.

Cox v. *U. S.* 16 L. W. 4029;
Ng Fung Ho v. *White*, 259 U. S. 276.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. (Art. I, sec. 9, U. S. Constitution.)

IV

The Execution of an insane person is so abhorrent to principles of justice as to offend due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and no State should carry out such an execution without a legal determination that the person about to be executed is not insane.

As early as Blackstone, and throughout the history of the English speaking people, the execution of an insane person has been regarded as abhorrent to the basic principles of justice which lie at the base of our institutions.

In his commentaries, book 4, sec. 24 (Cooley's Blackstone, Fourth Edition, Vol. 2, p. 1230) it is set forth as follows:

"Also if a man in his sound memory commits a capital offense, and before arraignment day, he becomes

mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If, after he be tried and found guilty, he loses his sense before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non sane memory, execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. Indeed, in the bloody reign of Henry the Eighth, a statute was made, which enacted that if a person, being *compos mentis* (of sane mind) should commit high treason, and after falling into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this *savage and inhuman law* was repealed by the statute 1 and 2, P. & M., c. 10. For as is observed by Sir Edward Coke, 'the execution of an offender is, for example, *ut poena ad paucos, metus ad omnes perveniat* (that the punishment may reach the few, but the fear of it affect all);' but so it is not when a madman is executed; he would be a miserable spectacle, both against law, and of extreme inhumanity and cruelty and can be no example to others."

It is respectfully submitted that there could be no more shocking spectacle, nor no more act offensive to the basic and fundamental principles of justice that lie at the base of our institutions of American Government, than to execute an insane person.

Not even the third, fourth or fifth electric shock of an attempted execution could exceed the inhumanity of executing an insane person. See *Resweber* v. *Louisiana*, 329 U. S. 459.

V

The execution of a person on the single statement of a superintendent of hospital after such execution has been halted by the verdict of a jury that such person is insane constitutes cruel and unusual punishment in violation of the Eighth Amendment and Fourteenth Amendment to the Constitution of the United States.

As pointed out under Point IV Blackstone commented that the execution of an insane person is "a miserable spectacle and is of extreme inhumanity and cruelty." While this Court has said that the Fourteenth Amendment would "prohibit by its due process clause execution by a State in a cruel manner" (*Resweber* v. *Louisiana*, 329 U. S. 459) historically the execution of an insane person has always been regarded as contrary to concepts of justice and freedom by a progressive society.

It is unthinkable that any State should permit the execution of an insane person. There is something inhuman and barbarous—something more than the mere extinguishment of life in such a proceeding. (*Resweber* v. *Louisiana, supra*, quoted with approval from *In Re Kemmler*, 136 U. S. 443, 444, 34 L. Ed. 519; *Resweber* v. *Louisiana*, 329 U. S. at 476.)

VI

The ordering of the execution of an insane person, without notice, without opportunity to be heard, without judicial review, and without counsel of his choice or of his friends or representatives to have an opportunity for judicial review, is so lacking in fundamental fairness as to violate both due process of law and to constitute cruel and unusual punishment inherent in the Fourteenth Amendment to the Constitution of the United States by reason of its presence in the Eighth Amendment to the Constitution of the United States.

We can think of no greater act of cruelty, nor any procedure more lacking in due process of law than to deny an insane person the benefit of counsel in a judicial hearing, with the full protection of the Court, before his execution. Such a person needs representation more than a sane or ignorant person. He needs representation to protect his fundamental rights. To rush him off to execution without notice, without hearing, and without judicial review, is contrary to the concepts of a civilized society which lie at the base of our institutions.

See *Lisenba* v. *California*, 314 U. S. 219, 86 L. Ed. 166; "Immutable principles of justice, which inhere in the very idea of free Government." *Holden* v. *Hardy*, 169 U. S. 366, 389, 42 L. Ed. 780, 790. "Fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert* v. *Louisiana*, 272 U. S. 312, 316, 71 L. Ed. 270, 273.

"Immunities implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 324, 325, 82 L. Ed. 288, 292. "Principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Snyder v. *Commonwealth of Mass.*, 291 U. S. 97, 105, 78 L. Ed. 674, 677.

Hurtado v. *California*, 110 U. S. 516, 530, 28 L. Ed. 232, 236;

Twining v. *New Jersey*, 211 U. S. 78, 53 L. Ed. 97;

Adamson v. *California*, 332 U. S. 46, 91 L. Ed. 1464.

Cruel and unusual punishments are punishments of a barbarous character and unknown to the common law, being such as disgraced the civilization of former ages, and made one shudder with horror to read of them. *In Re O'Shea*, 11 Cal. App. 568; 105 Pac. 776.

This Court is in duty bound under the Seventh Amendment to the Constitution of the United States to reexamine this case in the light of common law principles.

We respectfully pray for reversal of the judgment and order of the Supreme Court of California.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

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